

AMERICAN ARBITRATION ASSOCIATION

-----X	
In the Matter of the Arbitration	:
	:
Between	:
	:
CITY OF PHILADELPHIA,	:
	:
“City”	:
	:
- and -	:
	:
F.O.P, LODGE NO. 5,	:
	:
“Union”	:
-----X	

AAA Case No.
14 390 01026 12

Opinion & Award

Re: Discharge of
Kenneth Rossiter

Hearings: January 10, 2013
February 13, 2013
February 22, 2013

APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Diane A. Loebell, Esq., Senior Attorney Labor & Employment

For the Union

JENNINGS SIGMOND, P.C.
Thomas W. Jennings, Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City discharged Detective Kenneth Rossiter effective July 15, 2012. It did so based upon two charges of "Conduct Unbecoming." The charges, which allege violations of Department Disciplinary Code Sections 1-§010-10 and 1-§021-10, both stem from an Internal Affairs investigation said to establish that Rossiter, on multiple occasions, was at home away from his official duties while on paid time. (City Exhibit 10 & Union Exhibit 1.)¹ The Union contends the City lacked just cause to discharge Rossiter. It asks that Rossiter be reinstated to his position as a detective in the [REDACTED] and be made whole for all pay (regular and overtime) and benefits lost as a consequence of his discharge. It also requests that all references to the discharge be expunged from Rossiter's personnel file to the maximum extent permitted by law.

The basic facts of this case, including the areas of dispute, may be set forth succinctly.

At the time of his discharge, Rossiter had been a member of the City's Police Department for more than thirty years. Since 2002, he served as a detective assigned to the Department's [REDACTED]. His record of prior discipline consists of two reprimands issued in 1988 and 2011 for violating Department directives. (Joint Exhibit 2.)

¹ The Union represents that it has not accepted the current Disciplinary Code, which it maintains the Department implemented unilaterally in 2010. In response, it filed an unfair labor practice charge, which is pending before the Pennsylvania Labor Relations Board. It also sought a determination from the Act 111 Board of Arbitration that the Department's implementation of the current Code violated the Board's interest arbitration award for the period July 1, 2009 through June 30, 2014 ("Interest Award"). In its June 15, 2010 award, the Board found no violation of the Interest Award. However, it also ruled, that notwithstanding the terms of the Code, "[d]isciplinary arbitrators remain free to exercise their considered discretion when reviewing penalties the City imposes in cases where 'just cause' for discipline is found." (Union Exhibit 2.)

The Department's [REDACTED] which has citywide responsibility, is staffed by approximately 80 detectives and 12 superior officers or supervisors. The Unit has three shifts. The first two, referred to as [REDACTED] rotate between days and evenings, while the third [REDACTED] also known as [REDACTED] works a steady shift of 11:45 p.m. through 8 a.m. Since early 2009 Rossiter has been assigned continuously to [REDACTED]

The accounts given by various witnesses uniformly describe the [REDACTED] work as extremely demanding and requiring substantial overtime. This is particularly the case for the detectives on [REDACTED] during which time a disproportionate number of the [REDACTED] committed within the City occur. In recent years, a number of the detectives on [REDACTED] including Rossiter, reported working more than 1800 hours of overtime annually.

The governing collective bargaining agreement (the "Agreement") authorizes officers on [REDACTED] to leave two hours early (i.e., 6 a.m.) on days when they are required to appear in court. (Joint Exhibit 1, p. 15.) On such days, the practice for many years had been for [REDACTED] to sign in at court at 8 a.m., which placed them on what is known as "court overtime." However, as several witnesses testified without contradiction, sometime prior to the events in this case, a directive was issued precluding [REDACTED] detectives from signing in to court overtime until 9 a.m. Consequently, [REDACTED] supervisors instructed the [REDACTED] detectives to submit a request for "investigative overtime," also referred to as non-court overtime, for the period from 8 a.m. through 9 a.m. on any day that they had a court appearance following their

shift. As the name implies, detectives on investigative overtime are expected to perform work needed to solve their open cases.

By Department directive, detectives, once signed in to court overtime, must remain at the courthouse until their duties there are completed and they sign out.

However, as numerous witnesses confirmed, without dispute, the detectives in the [REDACTED] do not follow this directive as a matter of practice. Instead, at the encouragement of their supervising officers, [REDACTED] detectives upon arriving at court confer with the Assistant District Attorney(s) ("ADA") requesting their presence, determine the requirements for the day, and, if not immediately needed, leave and resume working on their open investigations. They return to court either upon being requested to do so by the ADA or at the conclusion of the day when they sign out of court overtime.

The events leading to Rossiter's discharge began with an anonymous complaint received by the Department on July 28, 2011. The complainant, identifying him/herself as a "neighbor," reported frequently observing Rossiter at home when he was believed to be on overtime. (City Exhibit 2.)²

Sergeant [REDACTED] the member of the Internal Affairs Division's Integrity Control Unit assigned to investigate the complaint, recounted the actions that he took in response. This included requesting surveillance of Rossiter by Internal Affairs investigators. In the course of the surveillance, which was conducted on twenty-three days during the period August 8, 2011 to September 9, 2011, investigators observed Rossiter at his home a total of sixteen times on nine separate days³ when he was recorded

² The Department's investigation did not reveal the identity of the complainant.

³ The relevant dates and times are: August 10th (5:10 a.m. – 6:00 a.m. and 8:00 a.m. – 8:54 a.m.); August 12th (11:11 a.m. – 11:39 a.m.); August 16th (4:35 a.m. – 6:00 a.m., 8:00 a.m. – 9:00 a.m. and 1:30 p.m. –

for payroll purposes as being on either straight time or overtime.⁴ On all but one occasion, the surveillance team noted that Rossiter had used a department vehicle in traveling to/from his home. [REDACTED] calculated that the time Rossiter was observed at home on these dates totaled four hours of straight time and twenty-one and one-half hours of overtime, which included both court and investigative overtime. He computed that together with the "meal" money paid to Rossiter, the value of this time was \$1,226.23.⁵

[REDACTED] also related that as part of his investigation, he interviewed Rossiter's supervisors, Sergeants [REDACTED] and Lieutenant [REDACTED]. Each confirmed that they had not given Rossiter permission to be at home at the times he was observed there.

In addition, he questioned Rossiter on December 13, 2011 concerning each instance he was observed at home by the surveillance team. He recounted that although Rossiter did not have a specific recollection of each incident, he suggested a variety of reasons for being at home on these occasions. These included stopping for a meal or to use the bathroom, working on open investigations, locating/contacting witnesses and retrieving a flash drive. Rossiter also noted that on one of the three occasions he was

2:54 p.m.): August 17th (8:00 a.m. – 9:10 a.m. and 11:26 a.m. – 2:43 p.m.); August 18th (11:20 a.m. – 12:00 p.m.); August 19th (10:58 a.m. – 11:40 a.m. and 12:27 p.m. – 2:13 p.m.); August 23rd (4:18 a.m. – 6:00 a.m. and 8:00 a.m. – 9:04 a.m.); August 31st (8:07 a.m. – 9:14 a.m. and 9:14 a.m. – 1:29 p.m.); and September 7th (10:40 a.m. – 12:30 p.m.).

⁴ [REDACTED] identified a series of documents confirming that on the dates and times Rossiter was observed at his home by the surveillance team, he was recorded as being on straight time or overtime. These included: (1) "Court Notice Information Reports," which show for each respective court appearance, among other things, the time at which Rossiter signed in and out of court; (2) Homicide Unit's Daily Court Attendance Report; (3) Homicide Unit's Daily Overtime Report; (4) Homicide Unit's Daily Court Overtime Report; (5) Homicide Unit's Daily Investigative Overtime Report; and (6) Request to Work Non-Court Overtime forms submitted by Rossiter. (City Exhibits 3 – 8, 10A, and 11 – 46.)

⁵ The Agreement provides for a meal allowance of \$7.00, which is payable whenever a detective or officer works three or more consecutive hours of overtime immediately following his/her scheduled shift. (Joint Exhibit 1, p. 59.) The Department's payroll system automatically computes and generates payment of the meal allowance based upon the detective's or officer's reported hours.

observed at home prior to 6 a.m. (i.e., August 10, 2011), he had been released early by his supervisor, Sergeant [REDACTED]

In his testimony, Rossiter expounded upon the reasons he was at home on the dates and times identified. He explained that he preferred to use the bathroom at his home whenever possible because the [REDACTED] was filthy and regularly infested with pests, such as rodents, fleas and roaches. He noted that in 2006, he suffered an allergic reaction from a fleabite he sustained while using the restroom there. Turning to some of the other reasons provided, he stated that it was common practice among [REDACTED] detectives to stop home for brief periods for a meal or to change clothes or groom for court.

He testified further that on any occasion he was observed at home for more than one hour, he was working on open cases. He stated this involved making phone calls, reviewing files and using his home computer to research internet social networking sites, which he finds to be a very valuable investigative tool. He noted that during the day, with the overlap of [REDACTED] detectives working overtime and [REDACTED] detectives on their regular shift, the demand for computer time frequently exceeded the eight computers available in the [REDACTED]. In addition, until 2012, only the three supervisors had sign-on credentials needed to access the internet from those computers.

He also highlighted that during the period covered by the surveillance, he had been working two very important investigations. He related that these cases were extremely complex and necessitated substantial amounts of investigative time.

Finally, he acknowledged using the Department vehicle assigned to him and his partner, Detective [REDACTED] when traveling to and from his home on the dates

the surveillance team observed him there. He asserted, however, that he was not aware of any rule prohibiting the use of a Department vehicle when stopping home during the workday, or any requirement that he obtain supervisory approval to do so.⁶

As a consequence of [REDACTED] investigation, the Department on March 29, 2012 charged Rossiter with two counts of "Conduct Unbecoming." (Joint Exhibit 2.) The first alleged a violation of Section 1-§010-10 of the Department's Disciplinary Code (i.e. making a false entry in any Department record), and the second alleged a violation of Section 1-§021-10 (i.e. conduct indicating employee has little or no regard for his responsibility as a member of the Department).

Commissioner Charles Ramsey testified that after reviewing the charges and the report of [REDACTED] investigation, he concluded that Rossiter should be discharged. He explained that Rossiter's actions, which involved claiming regular and overtime pay not earned, amounted to a misappropriation of funds. In view of the severity of this offense, he chose to implement his decision by "Commissioner's Direct Action" without a PBI hearing, effective July 15, 2012.⁷ (City Exhibit 10.)

This action prompted the instant grievance. When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded

⁶ Several witnesses (i.e. [REDACTED] also a member of the [REDACTED] corroborated aspects of Rossiter's testimony. This included: the presence of pests and unclean conditions at the [REDACTED] insufficient computers in the Unit to meet detectives' needs when shifts overlapping; and practice by [REDACTED] detectives of stopping home for brief periods during working time for meals and to change clothes and groom, including use of their assigned Department vehicle when doing so. Only [REDACTED] indicated that he also worked on cases when he stopped home.

⁷ Union Vice President John McGrody testified concerning several matters that were outside the conduct at issue here, but purported to call into question the propriety of the Commissioner's decision to discharge Rossiter. (Union Exhibits 9, 11 & 13.) However, since this evidence did not ultimately prove determinative in deciding this case, I will dispense with a full recitation of it here.

arbitration. Pursuant to their contractual procedures, the parties selected me to hear and decide the case.

I held a hearing on January 10, 2013, at the offices of the American Arbitration Association in Philadelphia, which continued on February 13, and February 22, 2013. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the February 22nd hearing, I declared the hearing record closed as of that date.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge the grievant, Detective Kenneth Rossiter, effective July 15, 2012?
2. If not, what shall be the remedy?

Positions of the Parties

The City contends that its discharge of Rossiter was for just cause. It maintains that the evidence conclusively demonstrates he is guilty of the charged offenses.

The City stresses that by his own admission, Rossiter confirmed the surveillance results. Specifically, he conceded being at home on numerous occasions for extended periods while either on straight time or overtime. It notes that although Rossiter offers explanations for being at home on each of the instances cited, the fact remains that he acted unilaterally without authorization from his supervisors.

It submits that the testimony of Rossiter's fellow [REDACTED] detectives does not support his claim of innocence. Simply put, these witnesses did not substantiate that

Rossiter's actions at issue here were an accepted, common practice within the Unit. They confirmed only that they stopped at their homes for brief periods for a meal when in the immediate area or as necessary to change clothes or groom for court. It points out that in contrast to Rossiter, none of these witness acknowledged using investigative overtime from 8 a.m. – 9 a.m. to remain at home before going to court following their early release at 6 a.m. Nor did they sign in to court overtime and then return to their homes. Finally, with the exception of [REDACTED] none reported working from home.

The City concludes that on the evidence presented, it has amply demonstrated that it had just cause to discharge Rossiter. However, in the alternative that I determine just cause is lacking because discharge constitutes too severe a penalty, it argues that any reduction in Rossiter's discipline must properly recognize the seriousness of his admitted infractions. It asserts therefore that any award modifying his discharge should impose a thirty-day unpaid suspension, exclude overtime from any back pay award, and deny him a return to Homicide. It reasons that these measures are necessary to send the essential message that actions have consequences, and there will be no reward for beating the system to receive pay for time not worked.

The Union, on the other hand, maintains that the City lacked just cause to discharge Rossiter. It submits that the City has failed to meet its burden of demonstrating that he committed either of the charged offenses.

The Union argues that the City's case is premised upon an untenable leap of faith. Namely, it asks the Arbitrator to conclude that Rossiter was not working on each of the instances cited based simply upon the fact that he was at home. The Union asserts that the City has failed to substantiate this conclusion either by inference or direct evidence.

It contends Rossiter's work performance belies the charges lodged against him here. It notes in this regard that none of Rossiter's superiors had any complaint with either his productivity or his level of effort. Indeed, all of his evaluations were extremely positive. (Union Exhibit 5.) Further, it points out that during the period Rossiter is alleged to have repeatedly abandoned his official duties by staying at home while on paid time, he successfully completed the investigation of two very complex cases.

Turning to the City's direct evidence, it notes that none of the investigators who conducted the surveillance of Rossiter testified. Therefore, their observations, as recounted by [REDACTED] constitute hearsay and should not be credited. It acknowledges that Rossiter did not deny the results of the surveillance, but asserts that the burden of proof rests with the City. Further, it highlights that before being questioned by [REDACTED] Rossiter did not receive any advance notice. For this reason, it maintains, the City cannot use the understandably generalized answers that he provided to [REDACTED] as a basis to challenge his credibility.

The Union stresses further that the flaws in the City's case are even more apparent once it is placed in context of the circumstances within the [REDACTED]. It avers that the philosophy within [REDACTED] was "do what you need to do to get the job done," even if that required bending the rules.⁸ It submits that Lieutenant [REDACTED] in his statement to [REDACTED] best articulated the culture within [REDACTED] when he said, "The [REDACTED] is a different animal. Detectives routinely work 16 and 20- hour days. Certain concessions must be made to be effective." (City Exhibit 50.) In view of these

⁸ In support of this position, the Union cited evidence of other rules not strictly followed within the [REDACTED]. This included a practice of not paying [REDACTED] Detectives the contractually required premium when they are requested to make a court appearance on less than 48 hours' notice, as well as deviations from the seniority rules in assigning detectives to [REDACTED] (Union Exhibits 6, 7 & 10.)

circumstances, it concludes that the City seeks to punish Rossiter here for doing nothing more than what he had long been instructed and encouraged to do.

Finally, it points out that the Department had no specific rules prohibiting the conduct with which Rossiter is charged (i.e., working from home or using a Department vehicle to travel there for that purpose). In the absence of such, Rossiter cannot be deemed to have done anything wrong by leaving court to work from home and not returning to the office.

In sum, the Union concludes that the City has not proven that Rossiter falsified his hours worked or was at home away from his official duties when reasonably believed to be working. Instead, the evidence proves only that Rossiter worked from home.

Accordingly, for these reasons, the Union asserts that its grievance should be granted, and the requested relief be awarded.

Opinion

The charges against Rossiter, in effect, allege a "theft of time." Stated otherwise, he is accused of being away from his official duties and falsely reporting and collecting regular and overtime pay, as well as meal money, for time that he did not work, but instead spent at home. There can be no doubt that this is an extremely serious offense, one that could well justify discharge.

The City, of course, carries the burden of proof here. It must establish that Rossiter is guilty of the charged offenses through the weight of the credible evidence. It must also prove that the level of discipline imposed is appropriate. The Union, on the other hand, has no corresponding burden. It need not disprove the charges against Rossiter. Indeed, he is entitled to the presumption of innocence.

After a careful review of the record and thorough consideration of the parties' arguments, I am convinced that the City has not met its burden. My reasons for this conclusion follow.

The testimony leaves no dispute as to certain critical facts. It is an accepted practice for [REDACTED] detectives to leave the courthouse while signed in to court overtime in order to work their open case, whenever their presence there is not immediately needed by the requesting ADA. Likewise, given the demanding nature of the work and the long hours required, [REDACTED] detectives, with at least the tacit approval of their supervisors, stop home for brief periods during their regular and overtime hours for such reasons as having a meal, changing clothes and grooming as necessary. Consequently, in light of Rossiter's testimony, and the lack of any contrary evidence, these practices serve to explain and excuse many of the sixteen instances that he was observed at home while on paid time.

However, there remain those instances where Rossiter was observed at his home for more extended periods, a fact he does not contest. As to those occasions, he claims to have been working from home. Normally, in this type of situation where an employer presents circumstantial evidence of the employee's guilt, and the employee presents a plausible exonerating explanation, I am compelled to make a credibility determination. However, it is unnecessary for me to do so here. The City's witnesses very plainly stated that they had no reason to doubt Rossiter's assertion that he was in fact working on his open cases when he was observed at home for extended periods of an hour or more. In

fact, on cross-examination, [REDACTED] candidly acknowledged that he believed Rossiter was truthful in making these assertions.⁹

In light of these circumstances, there is no basis for me to conclude that Rossiter either filed false reports to receive pay for time not worked or abandoned his official duties during periods when he was reasonably believed to have been working open investigations or attending criminal court proceedings. Instead, at most, I can find that Rossiter, unlike his fellow members of the [REDACTED] took undue liberties in choosing to work from home without obtaining prior supervisory approval. For this, the City might have properly issued Rossiter a formal reprimand. However, in view of all the circumstances, including the absence of any rule on the subject, I will not impose that penalty now.

One final comment is in order here. It is well within the City's authority to issue a directive barring Department employees from working at home without official authorization to do so. Had such a directive been issued, this dispute might never have arisen.


Accordingly, for all these reasons, the Union's grievance is granted.

⁹ It was suggested that this explanation could not excuse Rossiter's presence at home on August 23, 2011 during his scheduled shift (i.e., 4:18 a.m. – 6:00 a.m.) because, in doing so, he abandoned his responsibilities for a "Live" investigation. However, on the basis of the undisputed documentary evidence, the [REDACTED] in question did not become a "Live" investigation until the [REDACTED] at 7:29 a.m. that morning. (Union Exhibit 8.)

AWARD

1. The grievance is granted.
2. The City did not have just cause to discharge Kenneth Rossiter, effective July 15, 2012.
3. The City will promptly restore Kenneth Rossiter to his former position within the Department as a detective in the [REDACTED] without loss of seniority. In addition, the City will make him whole for all wages and benefits lost as a consequence of his discharge for the period from July 15, 2012 through the date of his reinstatement, less all outside wages and other earnings received by him as to this period. I will retain jurisdiction of this matter to resolve any dispute as to the monies to be paid to him based on this award, including the issue of whether Mr. Rossiter satisfied his obligation to mitigate his damages.
4. The Department will revise Kenneth Rossiter's personnel record to delete all references to his July 15, 2012 discharge to the maximum extent permitted under the governing law.

April 2, 2013


David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)

COUNTY OF NEW YORK)

ss.:

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

April 2, 2013


David J. Reilly, Esq.
Arbitrator